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APR 4 1957
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IN THE

Supreme Court of the United States

October Term, 1956

No. 100

GILBERT GREEN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

HENRY WINSTON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Gilbert Green and Henry Winston, petition that writs of certiorari issue to review judgments of the United States Court of Appeals for the Second Circuit which affirmed judgments of the United States District Court for the Southern District of New York convicting each petitioner of criminal contempt of an order requiring him to surrender for commitment, and sentencing each to

imprisonment for three years following completion of the five year sentence imposed on him in *United States v. Dennis*, 341 U. S. 494 (G.R. 109; W.R. 82).[1]

The two cases involve similar facts and identical questions of law and were consolidated for briefing and argument in the Court of Appeals which disposed of them in a single opinion.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. The opinion of the District Court in the *Green* case appears at 140 F. Supp. 117. Both opinions are set forth in App. A, *infra*, pp. 25, 32.[2]

Jurisdiction

The judgments of the Court of Appeals are dated and were entered on February 11, 1957. On February 21, 1957 an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to April 12, 1957. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

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[1] "G.R." and "W.R." refer to the records from the court below in the *Green* case and the *Winston* case respectively. Neither record has been printed. "G.G. Ex." designates a government exhibit in the *Green* case and "W.G. Ex." a government exhibit in the *Winston* case. "App." refers to an appendix to this petition.

[2] We refer to the opinion of the Court of Appeals as "C.A. Op." and to the opinion of the District Court in the *Green* case as "D.C. Op." The District Court did not write an opinion in the *Winston* case.

Questions Presented

1. Whether a criminal contempt may be punished by a prison sentence of more than one year.

2. Whether there was evidence that petitioners had knowledge of the existence of the order which they were convicted of disobeying.

3. Whether disobedience of an order requiring a convicted defendant to surrender for commitment is punishable as a contempt.

4. Whether it was an abuse of discretion to sentence petitioners to imprisonment for three years.

Statutes Involved

The pertinent statutes are set forth in App. B, *infra*, p. 39.

Statement of the Case

The proceedings against petitioners were initiated by orders to show cause supported by affidavits (G.R. 88-93; W.R. 65-68). Specifications subsequently filed charged that each petitioner had committed contempt by wilfully and knowingly disobeyed an order of the District Court, entered July 2, 1951, requiring him to surrender for commitment pursuant to the mandate of this Court in *Dennis* v. *United States*, *supra* (G.R. 98; W.R. 69).

The evidence showed that petitioners had been enlarged on bail pending appeal from their conviction in the *Dennis* case (G.R. 11; W.R. 13-14). On June 28, 1951, following affirmance of the convictions by this Court, the United States Attorney served petitioner's counsel with notice that on July 2 he would present to the District Court a

proposed order on mandate requiring petitioners to surrender for commitment on that date (G.R. 12, G.G. Ex. 3; W.R. 14-15, W.G. Ex. 4). Counsel for petitioners thereupon advised both men that they were required to appear before the District Court on July 2 (G.R. 15-16; W.R. 18).[3]

Neither petitioner appeared on July 2, at which time the proposed order requiring their surrender was entered and bench warrants were issued for their arrest (G.R. 12, G.G. Exs. 5, 6; W.R. 14-15, W.G. Exs. 4, 5). They were not apprehended but surrendered voluntarily, Green in February, 1956 and Winston in the following month (G.R. 22; W.R. 25). Immediately prior to surrendering, each petitioner mailed a statement to the press announcing his intention to give himself up and stating the reasons for his earlier failure to do so. Green made similar statements on the same subject in an interview with the press when he presented himself at the Court House. (G.R. 27-32, G.G. Ex. 9; W.R. 21-25.) It appears from these statements that, as their counsel conceded (G.R. 40-41; W.R. 43), both petitioners had fled to evade commitment. However, there was nothing in the statements or in any other evidence which indicated that, prior to his surrender, either petitioner had knowledge of the entry of the order of July 2, 1951 which he was charged with wilfully and knowingly disobeying.

Each petitioner moved to dismiss the proceeding against him on the grounds (1) that the court was without jurisdiction to convict a defendant of contempt for disobedience of an order requiring his surrender for commitment (G.R. 2-3; W.R. 3), and (2) that the evidence was insufficient to establish that petitioner had knowledge of the order of July 2, 1951 prior to his surrender (G.R. 39-40; W.R. 28). These motions were denied, as was the contention of peti-

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[3] Counsel had previously stated to the District Judge that all of the *Dennis* defendants would be present in court on July 2 (G.R. 14; W.R. 17).

tioners that the District Court was without power to impose a prison sentence for criminal contempt for a term in excess of one year (G. R. 6, 42, 65, W. R. 10-11, 34, 50-51).

In the Court of Appeals, petitioners limited their brief and argument to the question of the validity of the three year sentences since that court had previously decided the two additional issues raised at the trials adversely to petitioners in sustaining the contempt convictions of two other absconding *Dennis* defendants. *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905; *United States* v. *Thompson*, 214 F. 2d 545, cert. den. 348 U. S. 841. However, petitioners expressly reserved their right to present to this Court the issues not argued in the Court of Appeals (see C.A. Op., *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The trial court was without power to sentence petitioners to terms in excess of one year.

This case presents the question, not hitherto considered by this Court, whether the federal courts are authorized, at their discretion, to punish criminal contempts by prison sentences for any term, including life.[4] Petitioners contend that the federal courts do not have this unlimited discretion, but are restricted to the imposition of sentence as in the case of offenses which are not infamous.

An infamous offense is one which may be punished by confinement in a penitentiary. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348. Since such confinement is authorized where the sentence is for

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[4] Subject only to the limitation, if any, imposed by the constitutional prohibition against "cruel and unusual punishment".

a term of more than one year, offenses punishable by a longer term are infamous. (See 18 U. S. C. 408[3]; Notes of Advisory Committee on Rules to Rule 7, Federal Rules of Criminal Procedure.) Accordingly, if contempt is not an infamous offense, it may not be punished by a sentence of more than one year."

Put in other words, it is petitioners' position that criminal contempts are misdemeanors and not felonies as these terms are defined in 18 U. S. C. 1.

18 U. S. C. 401, in language derived from section 7 of the Judiciary Act of 1789, 1 Stat. 73, 83, authorizes a federal court to punish contempts "by fine or imprisonment, at its discretion."[4] We shall show that if the term "imprisonment" as used in these statutes can be construed to embrace imprisonment in a penitentiary, the power to impose such punishment was denied the federal courts by section 24 of the Clayton Act, 38 Stat. 739 (codified in 18 U. S. C. 402) and by Rule 7 of the Federal Rules of Criminal Procedure. Moreover, to construe the contempt power as authorizing infamous punishment, would violate the clause of the Fifth Amendment requiring the prosecution of infamous crimes by indictment.

We turn first to the Clayton Act, adopted on October 15, 1914. Sections 21 and 22 of that Act relate to contempts for disobedience to orders of a federal court where the contemptuous conduct is also a criminal offense under state or federal law. Section 22 requires that contempts of this character be tried to a jury and fixes the maximum

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[3] Derived from the Act of March 3, 1865, 13 Stat. 500. See *In re Mills*, 135 U. S. 263, 270.

[4] Section 7 of the Judiciary Act of 1789 authorized the courts "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

punishment at imprisonment for six months and a fine of $1000. Section 24 of the same Act provides:[7]

> "Nothing herein [in sees. 21 and 22] contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing.*" (Emphasis supplied.)

Section 24 accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in section 22. By its second clause (which we have italicized), it limits the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act.

The legislative history contains no discussion of the second clause of section 24, which we will refer to as the "prevailing usage clause."[8] But its language is plain and familiar principles of statutory construction require that it be given effect. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Hence, the authority of the federal courts to

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[7] The substance of sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and (as to jury trials) 18 U. S. C. 3691. (See *infra*, p. 8.)

[8] Congressman Clayton advised the House that contempts for disobedience of orders entered in actions to which the United States is a party were excepted from sections 21 and 22 so as not to weaken the power of the courts to enforce dissolution decrees in anti-trust cases. 48 Cong. Rec. 22591.

punish contempts of the classes described in section 24 must be determined by reference to the usage which prevailed in 1914.

The usage which prevailed, without exception, from 1789 until after the enactment of the Clayton Act was to punish contempts as offenses not infamous, *i.e.*, as misdemeanors. Prior to 1916,[3] there was no reported case in the federal or state courts of a sentence in excess of one year or other infamous punishment for contempt. In 1916, the Supreme Court of Iowa could state upon invalidating a statute authorizing a penitentiary sentence for contempt:

> "The authorities may be searched in vain for any precedent, under our constitutional form of government, holding it to be within the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt * * *." *Flannagan v. Jepson*, 177 Ia. 393; 158 N. W. 641, 643.

The effect of the prevailing usage clause of section 24 of the Clayton Act was to codify this century and a quarter of undeviating American practice and make it applicable to the classes of contempts to which the maximum sentence of six months provided by section 22 does not apply. Accordingly, these classes of contempts may not be punished as infamous offenses—*i.e.*, by prison terms of more than one year.

Congress incorporated the substance of section 24 of the Clayton Act into 18 U. S. C. 402 in the 1948 revision and codification of the criminal statutes. Section 402 substitutes the phrase "in conformity to the prevailing usages at law" for the original wording, "in conformity to the usages at equity and law now prevailing." This

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[3] The date of *Creekmore v. United States*, 237 F. 243, discussed *infra*, p. 10.

modification in phraseology, however, did not change the effect of the original enactment. It is well established that "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson v. Pacific Coast S.S. Co.*, 225 U. S. 187, 199.[9] The Reviser's Notes to section 402 specifically state that the differences in phraseology between that section and sections 22 and 24 of the Clayton Act "do not, however, change their meaning or substance." (18 U. S. C. A. 402, Reviser's Notes.)[10] It is clear, therefore, that section 402 did not change the date specified in section 24 of the Clayton Act for determining the "prevailing usage." Accordingly, section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits the courts from imposing contempt sentences in excess of one year.

The same limitation on the power of the federal courts to punish contempts is also imposed by Rule 7(a) of the Federal Rules of Criminal Procedure. The Rule provides that, "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *." The Rules cover criminal contempts. (See Notes of Advisory Committee on Rules to Rule 1, and Rule 42.) Although the question whether criminal contempt is a "crime" has been much

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[9] Congress recognized that this rule of construction was applicable to the codification of Title 18. See report of Representative Keogh to the American Bar Association, 92 Cong. Rec., A-61, A-62.

[10] The Reviser's Notes to Title 18 were made an appendix to the House Committee Report, and the reports of both the House and the Senate Committees state that these Notes contain a detailed explanation of every change made in the text of prior legislation. H. Rept. No. 304, 80th Cong., 1st Sess., on H.R. 3190, p. 9; S. Rept. No. 1620, 80th Cong., 2d Sess., on H.R. 3190, p. 2. The Reviser's Notes are entitled to great weight in construing the legislation. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 255.

debated, it is plainly an "offense." *New Orleans* v. *The Steamship Company*, 87 U. S. 387, 392. The requirement of Rule 7 is therefore applicable to contempts. Since they never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

As we have seen, there was no reported instance of infamous punishment for contempt prior to 1916. Since that date, such punishment (*i.e.* a prison term of more than a year) has been imposed in eight reported cases: *Creekmore* v. *United States* (C. A. 8, 1916), 237 F. 743 (a year and a day); *Conley* v. *United States* (C. A. 8, 1932), 59 F. 2d 929 (two years); *Hill* v. *United States* (1937), 300 U. S. 105 (two years); *Warring* v. *Huff* (C. A. D.C., 1941), 122 F. 2d 641 (a year and a month); *United States* v. *Lederer* (C. A. 7, 1944), 140 F. 2d 136 (a year and a day); *United States* v. *Hall* (C. A. 2, 1952), 198 F. 2d 726 (three years); *United States* v. *Thompson* (C. A. 2, 1954), 214 F. 2d 545 (four years); *Lopiparo* v. *United States* (C. A. 8, 1954), 216 F. 2d 87 (eighteen months).[12]

The question of the power of the court to impose sentence of more than one year was not raised or considered in any of the foregoing cases except *Creekmore* v. *United States*. That case, decided two years after enactment of the Clayton Act, does not mention the prevailing usage clause of section 24 which evidently was not called to the court's attention. And since the decision antedated the Federal Rules of Criminal Procedure by many years, no consideration was given to the effect of Rule 7. Except for the decision below, the *Creekmore*

[12] In one additional case this Court vacated a contempt sentence of a year and a day: *Nilva* v. *United States*, — U. S. — (February 25, 1957). In a second case, a three year sentence was reversed on appeal. *Yates* v. *United States* (C. A. 9), 227 F. 2d 844. The power of the courts to punish contempts as felonies was not raised or considered in either case.

case is the only decision on the power of a federal court to impose a contempt sentence of more than a year.[13]

The court below rejected petitioners' construction of the prevailing usage clause of section 24 of the Clayton Act. It stated (C. A. Op., *infra*, p. 30) that, "The 'usages now prevailing' meant practices that the courts for one reason or another thought controlling, not limitations that, so far as appears, they thought the particular occasion demanded on the merits."

The first difficulty with this reasoning is that it accounts for a century and a quarter of uniform judicial practice as a coincidence. Surely, it is unreasonable to assume that the first one hundred and twenty-five years of our history presented no contempt case in which a court thought that sentence of more than one year was "demanded on the merits."[14] "There are other and far more plausible ex-

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[13] The history of the question under state law is illuminating. There are only two reported cases of infamous punishment for contempt, in both of which the sentences were invalidated on appeal. *Flannagan* v. *Jefson*, *supra*; *Brown* v. *State*, 89 Okla. Cr. 443, 209 P. 2d 715. In the latter, the court vacated a penitentiary sentence under a statute similar to 18 U. S. C. 401 on the ground that infamous punishment is unauthorized in the absence of an express provision making contempt a felony. In *Rogers Mfg. Co.* v. *Rogers*, 38 Conn. 121, it was stated as axiomatic that imprisonment for contempt must be in a common jail, and not in a penitentiary. Currently, the punishment of criminal contempts is regulated by statute in 30 states. In 19, the maximum jail term is thirty days or less; in 8, six months or less, and in 2, one year. Three states make contempts punishable as misdemeanors, and four have enacted provisions along the lines of section 401. The state statutes are summarized in Appendix C, *infra*.

[14] See, e.g., *United States* v. *Shipp*, 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a Negro prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction.

planations for the undeviating practice of punishing contempts as offenses not infamous.

The practice may well have been the product of judicial self restraint, dictated by the summary nature of contempt procedure and the lack of a jury trial. Perhaps the constitutional question posed by the requirement that infamous crimes be prosecuted by indictment (*infra*, p. 14) lay in the background of judicial thought. Perhaps the courts entertained doubt as to whether section 7 of the Judiciary Act of 1789 and its successors authorized infamous punishment.[15] It seems obvious that it was considerations like these and not, as suggested below, the lack of a "particular occasion" which underlay the practice of treating contempts as misdemeanors.

Moreover, the court below failed to consider the purpose which animated the contempt provisions of the Clayton Act. Congress enacted them because of its recurring concern over judicial abuse and usurpation of power in contempt cases.[16] Section 22 modified the prior practice of punishment with respect to a specified class of contempts by

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[15] The court below thought that the words "at its discretion" in 18 U. S. C. 401 and similar phraseology in the earlier contempt statutes gave the courts unlimited power over the length and character of the prison sentence. But there is a countervailing consideration. Since the contempt statutes have always provided for fine *or* imprisonment in the alternative, the courts are without power to impose both penalties for the same contempt. *In re Bradley*, 318 U. S. 50. This limitation is intelligible if the power to imprison is restricted to jail sentences of relatively short duration. But the statute would violate common sense if construed to authorize either a fine or imprisonment for life, but to prohibit a sentence of a $500 fine and ten days in jail. And, of course, ambiguities in the statute will be resolved in favor of the accused. *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218, 221.

[16] See Frankfurter and Landis, *Power of Congress over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010.

limiting prison sentences to six months and fines to $1000. As we have seen, the first clause of section 24 excluded all other classes of contempts from the provisions of section 22. But section 24 did not stop there. Congress was evidently concerned with preventing innovations in the punishment of contempts of the excluded categories. It therefore added the prevailing usage clause to section 24, and thereby required the courts to adhere to the practice of punishing these contempts as misdemeanors and not as felonies.

The construction of the prevailing usage clause by the court below makes it a redundancy. For the court could not suggest any practice, other than the practice of punishing contempt as a misdemeanor, which the clause was designed to freeze into statutory law. The purpose of the clause could not have been to give Congressional sanction to the practice of trying contempts of the kind not covered by section 22 before a judge rather than a jury. That purpose was accomplished by the first clause of section 24 which makes the provisions of section 22 (including the provision for jury trials) inapplicable to such contempts. Hence, if the prevailing usage clause is not a limitation on the punishment for contempts not covered by section 22, it adds nothing to the first clause of section 24. But the prevailing usage clause may not be treated as surplusage. *McDonald* v. *Thompson*, *supra*.

The court below believed (C. A. Op., *supra*, p. 13) that the enactment in 1954 of 18 U. S. C. 3146 fortified its construction of section 24 and made consideration of Rule 7 of the Criminal Rules unnecessary. Section 3146 creates the crime of bail-jumping and punishes it by a maximum sentence of five years where the accused is bailed on a felony charge and one year where the charge is a misdemeanor. The reasoning of the court seems to be that Congress would not have specified a sentence of five years for the crime if it had thought that the maximum contempt

sentence for the same offense[17] was only one-fifth as long. Hence, the court concluded, neither section 24 nor Rule 7 could have been intended to place a one year limitation on contempt sentences.

But obviously the terms of a statute passed in 1954 can shed no light on what Congress intended by a statute passed in 1914. Much less can they illuminate the intention of this Court when it adopted the Criminal Rules in 1944. Moreover, even if section 3146 could be said to have any relevance to the question at hand, it would point to a conclusion contrary to the one drawn by the court. For it would be more reasonable to suppose that section 3146 was enacted because Congress thought a one year sentence inadequate for the offense and entertained doubt as to the power of the courts, in contempt proceedings, to punish it with greater severity.

We believe that we have shown, contrary to the decision below, that section 24 of the Clayton Act and Rule 7 of the Criminal Rules limit contempt sentences to terms of not more than a year and that the same limitation may be implicit in 18 U. S. C. 401. At the very least, we have demonstrated that this conclusion is tenable. If so, it should be adopted. For a contrary conclusion would give rise to a major constitutional question and violate the principle that, if possible, statutes should be construed to avoid constitutional problems. *United States* v. *Rumely*, 345 U. S. 41, 45.

The constitutional question which rejection of petitioners' contention would present is whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But in *Gompers* v. *United States*, 233 U. S. 604, 610, it declared that if criminal contempts "are not

[17] The statute is broader than any possible reach of the contempt power since it makes bail-jumping a crime even though no order has been entered requiring the appearance of the accused.

criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Accordingly, many constitutional and statutory provisions for the protection of those accused of crime have been held applicable to criminal contempts.[18] The one exception to the treatment of criminal contempts as crimes is the holding that they are not "criminal prosecutions" within the jury trial requirement of the Sixth Amendment. Although it is now recognized that this exception rests on an historical error,[19] it is perhaps too late in the day for judicial correction of the mistake. But certainly the error should not be perpetuated by extending its application to other constitutional guarantees.

The opinion below (C. A. Op., *infra*, p. 28) implicitly acknowledges that the constitutional question presented here is not free from doubt. But the court did not consider that the existence of the doubt was a factor to be considered in construing section 24 of the Clayton Act, Rule 7 of the Criminal Rules and 18 U. S. C. 401. It resolved the constitutional question against petitioners because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceedings must be by an indictment, and yet that it need not be tried to a jury." But petitioners' contention involves no such

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[18] The prohibition against double jeopardy, the privilege against being called as a witness, the right to a speedy trial, compulsory process and the assistance of counsel, the presumption of innocence, proof of guilt beyond a reasonable doubt, the pardon power of the President, and the statute of limitations applicable to crimes. *In re Bradley*, 318 U. S. 50; *Gompers v. Buck Stove and Range Company*, 221 U. S. 418; *Blackmer v. United States*, 284 U. S. 421; *Cooke v. United*, 267 U. S. 517; *Ex parte Grossman*, 267 U. S. 87; *Gompers v. United States*, 233 U. S. 604.

[19] A statement in an unpublished opinion by Wilmot, J., in *Almon's Case* (1765) that it was "immemorial usage" to punish all contempts summarily. See Fox, *The History of Contempt of Court* (1927) and Frankfurter and Landis, *supra*.

anomaly. If we are right, criminal contempts are not subject to infamous punishment, may not be punished by imprisonment for more than one year, and are therefore not infamous crimes within the Amendment.[*] Accordingly, they need not be prosecuted by indictment.

The statutory limitation for which we contend on the power to punish contempts avoids the constitutional question. It equates federal practice with that which prevails in every state (see ftn. 13, *supra*, and App. C, *infra*). Moreover, it implements the sound democratic principle stated by Mr. Justice Field that:

> "The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution * * *." *In re Bonner*, 151 U. S. 242, 259.

The question whether federal judges have unlimited discretion to fix the term of imprisonment for criminal contempt is obviously important. Its importance has been accentuated in recent years by the growing frequency of long penitentiary sentences in contempt cases. (See cases cited *supra*, p. 10.) Review of the question by this Court is therefore both necessary and timely.

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[*] In disposing of the constitutional question, the court below also relied on the saving clause of the bail-jumping statute (18 U. S. C. §3146) that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." The opinion states (C. A. Op., *infra*, pp. 28-29) that this clause "was a recognition of the power as it had then developed". But even if it can be said that the saving clause recognizes the existence of judicial power to impose *infamous* punishment for contempt, Congressional recognition of an unconstitutional power does not make the power constitutional.

2. There is no evidence that petitioners had knowledge of the existence of the order which they were convicted of disobeying.

Each petitioner was tried and convicted of "wilfully and knowingly disobeying" the order of the District Court of July 2, 1951, ordering all of the *Dennis* defendants to surrender for commitment on that day (G. R. 42, 46; W. R. 35, 39). Knowledge by petitioners of the existence of this order was therefore an essential element of the offense, which the prosecution was required to prove beyond a reasonable doubt. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444. No such proof was introduced.

All that the evidence established was the following. On June 28, 1951, after the affirmance of the *Dennis* conviction by this Court, counsel for petitioners told the District Judge that they would have their clients in court on July 2, at which time the United States Attorney was to present for signature an order requiring all of the *Dennis* defendants to surrender for commitment (G. R. 14, G. G. Ex. 5; W. R. 17, W. G. Ex. 4). On June 29, counsel informed petitioners that their presence in court on July 2 was required (G. R. 15; W. R. 18). Petitioners did not appear on that day, at which time the proposed order for their surrender was signed and bench warrants issued for their arrest (G. R. 12, G. G. Exs. 5, 6; W. R. 14-15, W. G. Exs. 4, 5).[21] Petitioners were not apprehended but surrendered voluntarily four years later (G. R. 22; W. R. 25). At the time of their surrender, petitioners made statements to the press which established that they had absconded in order

[21] The opinion of the Court of Appeals erroneously states (C.A. Op., *infra*, p. 25) that the order for petitioners' surrender was entered by the District Judge and served on counsel for petitioners on June 28. The facts are correctly stated in the opinion of the District Court (D.C. Op., *infra*, p. 32), and it appears from the order itself (G.G. Ex. 5; W.G. Ex. 4) that it was signed and entered on July 2.

to avoid service of their sentences. None of these statements, however, made any reference to the order of July 2 or contained any indication that petitioners knew that such an order had in fact been entered. (G. R. 27-32, 39; G. Ex. 9; W. R. 21-25; and see D. C. Op., *infra*, p. 33.) Thus, there was no evidence that petitioners knew of the existence of the order and, hence, no basis for finding that they had knowingly disobeyed it.

Nevertheless, the District Court found that the evidence established petitioners' knowing disobedience of the order beyond a reasonable doubt (D. C. Op., *infra*, p. 33; W. R. 37-38). In so doing, it followed the decision in *United States* v. *Hall*, *supra*, in which a majority of the Court of Appeals sustained the conviction for contempt of another absconding *Dennis* defendant upon evidence substantially the same as that in the present cases.[22]

Hall, like petitioners, was notified by his counsel on June 29, 1951 that his presence was required in court on July 2, absconded prior to that date, and was not shown to have had knowledge of the entry of the order requiring his surrender. The majority opinion seems to rest on alternative theories of guilt. First, the opinion holds (at 730) that Hall was guilty of disobeying a "command" of the court, of which he had notice, to appear before it on July 2. Second, *(ibid.)* it finds that counsel's notification of June 29 constituted constructive notice to Hall of the order thereafter entered on July 2 requiring him to surrender for commitment.[23] The difficulty with the first alternative is that

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[22] Hall, however, did not surrender voluntarily but was apprehended.

[23] Thus, after finding that Hall had notice of the order of July 2 and wilfully disobeyed it, the opinion states (at 730, ftn. 7): "That this was a notice to appear for the order of commitment, rather than the order itself, raises no question; the notice, too, formed part of the court's command."

Hall, like petitioners, was charged with and convicted of disobeying the order of July 2 and not of any prior "command" of the court, if one had in fact been given. The difficulty with the second alternative is that it sustains a conviction for knowing disobedience of an order without evidence that the accused had knowledge that the order was in fact entered.

Both of these errors are discussed at length in the dissenting opinion of Judge Biggs (at 733-35) who concludes his opinion with the statement (at 735) that, "A question of great public policy is here involved, however. The constitutional question aside, can it be said that Congress in enacting Section 401, Title 18, U. S. C. intended its provisions to have the United States Courts base convictions for criminal contempt on orders not yet entered? When the statute speaks of an 'order,' the reasonable conclusion is that it means an order *in esse*."

The "question of great public policy" which arose in the *Hall* case is again presented here and should be reviewed by this Court.

3. The courts below were without power to punish as criminal contempts petitioners' disobedience of the order requiring them to surrender for commitment.

It is petitioners' position that disobedience of an order requiring a convicted defendant to surrender for commitment was not a contempt at common law or under section 7 of the Judiciary Act of 1789, and is therefore not punishable as such under 18 U. S. C. 401.

At common law, a defendant who absconded in violation of an order requiring his appearance was not punishable for contempt. Instead, he was subject to outlawry upon becoming *quinto exactus*, that is upon failing to appear after his presence had been demanded in five successive

county courts. If he surrendered before the *quinto exactus* he received no punishment at all. 4 Blackstone, *Commentaries* (N. Y., 1854), 283; 2 Hale, *Pleas of the Crown* (Dublin, 1778), 224; 1 Pollock and Maitland, *The History of English Law* (2d Ed., 1898), 539.

Section 7 of the Judiciary Act of 1789 empowered the courts to punish "all contempts of authority in any cause or hearing before the same." Since the statute did not otherwise define "contempts," the term embraced only those offenses which were punishable as contempts at common law. See *United States* v. *Palmer*, 3 Wheat. 610, 630; *Jerome* v. *United States*, 318 U. S. 101, 108, fn. 6. Inasmuch as absconding was not a contempt at common law, it was therefore not punishable as such under the Judiciary Act.

Literally read, 18 U. S. C. 401 would seem to authorize the courts to punish disobedience of any lawful order (including an order for the surrender of a defendant) as a contempt, and in this respect to enlarge the contempt power as it existed under the original Judiciary Act. But such a reading ignores the language and purpose of the antecedent statute from which 18 U. S. C. 401 was derived. Section 401 (like its predecessor, 280 U. S. C. (1940 ed.) 385) represents a codification of the Act of March 2, 1831, 4 Stat. 487.[24] The latter recited that it was "declaratory of the law concerning contempts of court," and provided that:

> "* * * the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases except * * * the disobedience or resistance by * * * any other person or persons, to any lawful writ, process, orders rule, decree, or command of said courts."

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[24] See 18 U. S. C. A. 401, Reviser's Note, and *Nye* v. *United States*, 313 U. S. 33, 45.

This wording makes it clear that the statute did not extend the contempt power to conduct which was not punishable as a contempt under section 7 of the Judiciary Act. On the contrary, both the language and legislative history of the statute show that it was intended as "a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789." *Nye v. United States*, 313 U. S. 33, 45. It follows that since disobedience of an order requiring the surrender of a defendant was not a contempt under the Act of 1789, it did not become punishable as such under the Act of 1831, either in its original form or in the codification which now appears in 18 U. S. C. 401. (See *supra*, p. 9.)

Research has disclosed no case prior to *United States v. Hall*, *supra*, in which a fugitive was prosecuted for contempt in a federal court.[*] The fact that there was no assertion of the contempt power in such a case for 162 years after the Act of 1789 and 120 years after the Act of 1831 substantiates our contention that the power is non-existent. See Frankfurter, *Some Reflections on the Reading of Statutes* (1947), p. 26.

The court in the *Hall* case acknowledged (at 727) that the common law did not consider a defendant who violates an order for his surrender in contempt. Nevertheless, it sustained the conviction on the ground that 18 U. S. C. 401, on its face, appears to include any lawful order and makes no exception for orders requiring surrender. The court reached this conclusion without considering the effect of the Act of 1789 or the language and purpose of the Act of 1831.

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[*] The dissent in the *Hall* case, *supra*, at 734 states: "Hall's counsel contends that in the whole course of our law as well as that of England there has been no proceeding like the one at bar. The view asserted may be an exaggerated one but exhaustive independent research has disclosed no similar case."

We submit that the decision in *Hall* was erroneous and, in any event, that the issue decided there and raised again here presents a novel and important question of statutory construction which should be reviewed by this Court.[26]

4. The trial court abused its discretion in sentencing petitioners to imprisonment for three years.

Except for *United States* v. *Hall* and *United States* v. *Thompson*, both *supra*, there has been no reported case of a contempt sentence in excess of two years (see *supra*, p. 10).[27] We believe that the three and four year sentences imposed on Hall and Thompson were excessive. In any event, the present cases are distinguishable on their facts. Hall and Thompson were apprehended, while petitioners surrendered and thus voluntarily submitted themselves to the authority of the court.

The court below held that since 18 U. S. C. 3146 fixes a maximum sentence of five years for the crime of bail jumping, a three year sentence is not excessive for the offense when prosecuted as a contempt (C. A. Op., *infra*, p. 31).[28] The court saw no reason to hold that "the maximum punishment for the same offence should depend upon the mode of trial" (C. A. Op., *infra*, p. 31). We believe that the

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[26] 18 U. S. C. 3146, making bail-jumping a crime, was passed after the decision in *Hall's* case. The saving clause of that section with reference to contempt (*supra*, p. 16; ftn. 20) obviously cannot establish that Congress intended to punish bail-jumping as a contempt under the Act of 1831 or 18 U. S. C. 401 (see *supra*, p. 14).

[27] In the remaining cases in which sentences of more than one year were affirmed, the sentences were as follows: a year and a day (two cases); a year and a month (one case); eighteen months (one case), and two years (two cases).

[28] The court also relied on the precedent of the *Hall* and *Thompson* cases (*ibid.*).

court was wrong. It is one thing to punish a man with a long penitentiary sentence which has been authorized by Congress upon conviction after indictment and trial by jury. It is quite another to impose the same sentence upon a summary conviction for contempt, even assuming that such a sentence is within the power of the court. In the latter case, the guiding principle should be exertion of "the least possible power to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231. The three year sentences imposed here, consecutive upon five year sentences under the Smith Act, violate that principle. For "the end proposed" was the vindication of the authority of the court, to which petitioners, albeit belatedly, had voluntarily submitted.

Review by this Court should therefore be granted to determine whether, if sentence of more than one year is authorized in contempt cases, the three year sentences imposed were not an abuse of the trial court's discretion.[29]

Conclusion

The petition for writs of certiorari should be granted.

Respectfully submitted,

John J. Abt,
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New York 7, N. Y.,
Attorney for Petitioners.

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[29] This Court has power to reduce contempt sentences which it finds excessive. *United States v. United Mine Workers*, 330 U. S. 258, 304.

APPENDIX A

Opinions Below

1. Opinion of Court of Appeals.

Before:

HAND, HINCKS and WATERMAN,

Circuit Judges.

Appeals from judgments of the District Court for the Southern District of New York (Dawson, *J.*, presiding), sentencing the appellants to three years imprisonment for criminal contempt.

HAND, *Circuit Judge*:

The appellants, Green and Winston, appeal from sentences of three years imprisonment under the following circumstances. Each was one of a number of defendants convicted of a violation of § 2385 of Title 18, U. S. C., commonly known as the "Smith Act," after a long trial which ended on October 14, 1949; we affirmed the judgment on August 1, 1950, and the Supreme Court did the same on June 4, 1951. On the mandate of the Supreme Court's affirmance an order issued out of the District Court, directing all the defendants to appear for surrender to the marshal on July 2, 1951, and on June 28 it was served upon the attorney for the appellants who had both been released on bail pending the appeals. They did not appear on the return day, and successfully evaded arrest until they eventually surrendered, Green in February 1956 and Winston in March. These proceedings to punish them for disobedience of the order of June 28, 1951, were begun against

them before Judge Dawson, who after a hearing without a jury on March 26, 1956, sentenced each to a term of three years, cumulatively upon the original sentence of five years. Upon these appeals, which involve the same questions and may be decided together, three questions arise: (1) Whether the District Court has power to impose any sentence of more than one year for disobedience of its orders; (2) whether it had any power whatever to sentence these particular appellants for failure to surrender in response to the order of June 28, 1951; and (3) whether there was evidence enough to fix them with notice of that order before their surrender. Believing that our decisions in *United States* v. *Hall*, 198 F. 2d 726 and *United States* v. *Thompson*, 214 F. 2d 545, foreclose our consideration of the second and third questions, the appellants do not press them here, explicitly reserving, nevertheless, the right to do so should the cases come before the Supreme Court. Although in these two decisions we affirmed sentences of three and four years, we will assume, *arguendo*, that the first point, unlike the second and third, remains open.

The following is the first of the appellants' two arguments in support of the position that the sentences for more than one year were invalid. The Supreme Court definitively held in *Ex parte Wilson*, 114 U. S. 417, 429, that "a crime punishable by imprisonment for a term of years at hard labor is an infamous crime"; and it is no longer necessary that the feature of "hard labor" be added, if the confinement may be in a penitentiary. *Mackin* v. *United States*, 117 U. S. 348, 352; *In re Claasen*, 140 U. S. 200, 205. The punishment for any crime punishable by a sentence of more than a year, may be by confinement in a penitentiary (§ 4083, Title 18, U. S. C.); and it follows that a sentence for disobedience of a court order may not be for more than a year, for in that event it is an "infamous crime," and

must be prosecuted by indictment under the Fifth Amendment.

Concededly, this argument depends upon whether such disobedience is a "crime" within the meaning of the Fifth Amendment. In a civil action ordinarily the proceeding is only remedial and imprisonment is imposed only to coerce compliance; but it may also be punitive, provided its penal character be clearly enough disclosed from the outset.* Moreover, that is true *a fortiori* when the order, as here, issues as a step ancillary to a criminal prosecution. *Gompers v. United States*, 233 U. S. 604, 610, was a civil action in which the imprisonment for disobedience was purely punitive, and Holmes, J., speaking for the court used the following language:

> "It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, . . . and that at least in England it seems that they still may be and preferably are tried in that way."

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* *United States v. Rapp* (C. A. 2, February 4, 1957).

** *In re Kahn*, 204 F. 581 (C. A. 2); *In re Guzzardi*, 74 F. 2d 671 (C. A. 2); *McCain v. New York Stock Exchange*, 80 F. 2d 211 (C. A. 3).

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Nevertheless, in spite of this statement there has been much confusion in the language used by the courts to describe criminal contempts; for certainty they have not consistently been called "crimes." Apparently by reason of faulty history, it became the prevailing belief about the end of the 18th Century that disobedience of court orders might be treated summarily without a jury, which would not have been possible had the Sixth Amendment applied to it. In any event so much has become well settled;* and the resulting confusion was enough to provoke Chief Justice Vinson, then speaking for the Court of Appeals of the District of Columbia, to say: "we see no advantage in rehashing the discussions on whether criminal contempt is sui generis," [which had been a favorite evasion] "offense, crime or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes, and some of it is not."*

Nevertheless, confused as the thinking no doubt has been, one thing seems certain: it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be begun by an indictment, and yet that it need not be tried to a jury. It would be even more unwarranted to make the right to a jury depend upon whether the imprisonment is more than a year; for the Sixth Amendment covers all "criminal prosecutions," except those for "petty offenses."** Perhaps all the decisions have been wrong that have held that disobedience may be so tried; but, if so, we may not overrule them; and indeed, when Congress in 1954 enacted § 3146 of Title 18

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* *Eisenbeckerv. Plymouth County*, 134 U. S. 31, 38; *In re Debs*, 158 U. S. 564, 596; *Myers v. United States*, 264 U. S. 95, 103; *United States v. United Mine Workers*, 330 U. S. 258, 296.

* *Warring v. Huff*, 122 F. 2d 641.

** Section 1(3), Title 18, U. S. C.

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it expressly declared: "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." That was a recognition of the power as it had then developed.

The appellants' second point is that in any event § 24 of the Clayton Act limited the permissible imprisonment for criminal contempts to a year. This argument runs as follows. Before 1914 there was no recorded decision of any sentence of more than a year for a criminal contempt, though there had been extremely large fines. That section was one of three—21, 22 and 24—the first two of which provided for the trial for disobedience of orders or judgments when "the act or thing" was a "criminal offense under any statute of the United States, or under the laws of any State in which the act was committed." The trial must then be to a jury. Section 24 provided that although §§ 21 and 22 should apply "to such contempts," "all other cases of contempt . . . may be punished in conformity to the usages at law and in equity now prevailing." This remained unchanged until the Act of 1948, when this passage, then a part of the last paragraph of § 402, Title 18, was changed to read: "may be punished in conformity to the prevailing usages at law." Although there had been decisions between 1914 and 1948 (this argument continues), in which courts had affirmed sentences longer than one year, these were mistakes, because § 24 by incorporating into the statute the usages then "prevailing," forbad longer sentences. Moreover, the change in 1948 from "usages at law and in equity now prevailing" to "prevailing usages at law" is not to be understood to indicate any change in the scope of the statute, for it was the declared purpose of the Revisers not to change its "meaning or substance."

This reasoning also does not convince us. There is no reason to suppose, because courts had not up to 1914 im-

posed imprisonment for more than a year, that they th
they had not the power to do so. There would have
no basis for such a conclusion except the constitu
argument that we have just held invalid, and there
in the books a syllable of recognition of any such sup
limitation. The "usages now prevailing" meant pra
that the courts for one reason or another thought co
ing, not limitations that, so far as appear, they th
the particular occasion demanded on the merits. Th
guage of § 401 has always been in substance as it
now: a "court of the United States shall have pow
punish by fine or imprisonment, at its discretion, such
tempt of its authority," etc. The phrase "at its discret
does not mean that the court must choose between fin
imprisonment; the word "or," itself provides as muc
the words, if so construed, would have been redu
The term of imprisonment is to be as much in the c
discretion as the fine. Besides, whatever may have
the longest sentence up to 1914, certainly during th
suing period of 34 years up to 1948, in at least fo
stances sentences of more than a year were affirmed f
very reason that the length of imprisonment was
determined at the court's "discretion." * The sa
true of four decisions of courts of appeals after 19
of which, like the four earlier ones, declared, though
and without discussion, that the court's discretion ha
been abused." **

Thus there has been an unbroken line of authorit
trary to the proposition that § 24 put a year's limit

* *Cockmore v. United States*, 237 F. 743 (C. C. A. 8);
v. United States, 59 F. 2d 929 (C. A. 8); *Warren v. Hu*
122 F. 2d 641 (C. A. D. C.); *United States v. Lederer*, 14
136, 139 (C. A. 7).

** *United States v. Hall*, *supra*; *United States v. Tho*
supra; *Nilva v. United States*, 227 F. 2d 74 (C. A. 8); *Lop*
United States, 216 F. 2d 87 (C. A. 8).

imprisonment. Moreover, by the Act of 1954, of which we have spoken, it provided that a person who was admitted to bail, and who failed to appear, became subject to imprisonment for not more than five years, when tried by a jury, if the charge on which he was tried was a felony, but for only one year, if the charge was a misdemeanor. Therefore, if the court's summary power is limited to one year's imprisonment in the case of felonies, the result is that, when the defendant is charged with a felony and "jumps bail," he may be imprisoned only five times as long if he is tried to a jury as he can be if he is tried to a judge; but when he is charged with a misdemeanor, it makes no difference whether he is tried to judge or jury. It is hard enough to see why the maximum punishment for the same offence should depend upon the mode of trial; but it is impossible to suppose that so great a disparity should have been intended when the offender was charged with "jumping bail" in a prosecution for felony, but that no disparity whatever should have been intended when he did the same in a prosecution for a misdemeanor. Moreover, the Senate Report (U. S. Code Congressional and Administrative News, 1954, Vol. II, p. 3074) dictates that the "proposed legislation seeks to create a statutory deterrent which will minimize the possibility of bail forfeiture"; and it is extremely unlikely that so great an increase as five-to-one would not have been mentioned, if it had been supposed that the existing maximum in felonies was only a year.

Finally, in view of this statute, especially directed as it is against this particular kind of disobedience, we cannot hold that three years was an abuse of discretion, when we remember that in *United States* v. *Hall*, *supra* (128 F. 2d 726) and *United States* v. *Thompson*, *supra* (214 F. 2d 545), we sustained as long, or longer, sentences.

We do not see that either Criminal Rule Seven or Rule Forty-two, needs any discussion, if what we have said is true.

Judgments affirmed.

2. Opinion of District Court in the *Green* Case.

Dawson, *D. J.*

This proceeding was brought on by an order to show cause duly served upon the respondent, directing him to show cause why he should not be adjudged and held in criminal contempt of this Court by reason of the fact that he knowingly and deliberately disobeyed and resisted a lawful order and command of this Court directing him to appear before it on July 2, 1951 and July 3, 1951 for surrender for execution of the judgment and sentence imposed under an indictment C 128-87.

Respondent was convicted in this Court, after a long trial before Judge Medina, of conspiring to teach and advocate the overthrow of the government by force and violence, 18 U. S. C. A. 2385, and pending appeal from his conviction was ordered released on bail. The conviction was sustained by the Court of Appeals, 183 F. 2d 201, and on June 4, 1951, the Supreme Court affirmed his conviction. *Dennis v. United States*, 341 U. S. 494. A proposed order on mandate requiring his appearance for surrender to the United States Marshal on July 2, 1951 was served upon his counsel on June 28, 1951. Respondent did not appear on July 2, 1951. And attempts thereafter to execute a bench warrant at his stated address failed.

Respondent was arraigned and pleaded not guilty to the charge of contempt, and the issues were tried by the Court without a jury pursuant to Federal Rules of Criminal Procedure, Rule 42.

The evidence showed that the order of Judge Ryan of July 2, 1951 required the respondent to surrender personally to the United States Marshal for the Southern District of New York. There is no doubt that respondent did not surrender for over four years, or not until February 27, 1956 when he surrendered himself for commitment at the United States Courthouse in New York, N. Y.

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The evidence was sufficient to establish, beyond a reasonable doubt, that the respondent knowingly disobeyed the order of Judge Ryan. The evidence showed that Mr. Seidler, an attorney in the case, personally advised the respondent on June 26th that he had to be in Court on July 2, 1951. There was other evidence that thereafter, but before July 2, respondent left his New York City address and was not seen there again. There was further evidence that several days before respondent surrendered, he issued a written statement to the press admittedly signed by him which conclusively established that he had remained in hiding in order to avoid serving the sentence to which he had been committed. Furthermore, on the day on which he surrendered, respondent made statements to the reporters who were present on the Courthouse steps which also conclusively established that he had knowingly and wilfully absented himself so as to avoid serving a sentence which he knew had been imposed upon him.

From the testimony, the Court found as a fact that respondent had notice of the order and wilfully disobeyed it. *See United States v. Cue Hall*, 198 F. 2d 726 (C. A. 2, 1952), cert. den. 345 U. S. 905 (1953).

Respondent then contended that the Court was without power to impose a sentence of contempt of Court of more than one year, and this opinion deals primarily with that question.

401 of 18 U. S. C. provides that

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as

> • • •

> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

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It is the argument of the respondent that this provision is not a grant of unlimited power to the Court, but that the discretion of the Court is confined to punishment for a misdemeanor, as defined in Act Tit. 18 U. S. C., i.e., a crime punishable by imprisonment for not more than one year. Respondent argues that at Common Law, contempt was considered to be a misdemeanor; and that if § 401 is construed to authorize the punishment of contempt by a term of more than one year, it would violate that provision of the Fifth Amendment to the United States Constitution which provides that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This argument presupposes that criminal contempt is an "infamous crime" within the meaning of those words as used in the Fifth Amendment.

While, for certain purposes, contempt cases may be considered criminal cases, it has been well established that "proceedings in contempt may be said to be sui generis". *O'Neal v. United States*, 190 U. S. 36 (1903).* The Court of Appeals for the Eighth Circuit in a case which raised the point now urged by the respondent decided that a criminal contempt is an "offense" and that the sentence imposed might exceed a year in the penitentiary. *Cruickshank v. United States*, 237 F. 743 (1916).

The argument that the English courts at the time of the adoption of the original Judiciary Act of 1789 considered criminal contempts as misdemeanors is not persuasive. In those days, many crimes which were considered misdemeanors were punished by sentences much more severe than one

* See to same effect *Boudoin v. Boudoin*, 278 S. W. 2d 670 (Sup. Ct. Tenn. 1955).

year in the penitentiary. In fact, in those days, the fact that a crime was a felony implied in law that it was punishable by capital punishment even if the statute prescribed no penalty." Blackstone, *Commentaries on the Laws of England* (1765-9) Vol. IV, p. 98. Consequently, characterization of an offense as a misdemeanor meant merely that it was not punishable by capital punishment and not, as respondent contends, that it was punishable by imprisonment of no more than one year. Blackstone, with reference to the punishment for contempt, states as follows:

> "If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or *ignominous* punishment." Vol. IV, p. 287 (emphasis added).

The respondent argues that by virtue of the Common Law, a criminal contempt is a misdemeanor and hence is not punishable by a sentence of more than one year under 18 U. S. C. A. This argument involves a misapprehension of 18 U. S. C. A. This section does not state that if a crime is a misdemeanor it may not be punished by a sentence of in excess of one year. Rather, the section provides the reverse, that if the allowable punishment is one year or less, the crime is a misdemeanor. Thus, it is the penalty which governs the classification and not any characterization or classification given by the Common Law or by a statute which governs the penalty. *Ex parte Bride*, 279 F. 147, 149 (E. D. N. Y. 1922), aff'd 263 U. S. 4 (1923).

The point urged by respondent depends not so much upon the penalty which might be imposed but rather upon the question as to whether contempt was at the time of the framing of the Constitution considered as that type of "infamous crime" which at Common Law was triable by a jury.

While it has been said by distinguished authors that up to 1720, cases of contempt in England, when committed not

in the presence of the Court or by persons officially connected with the Court, were tried by a jury, there is no indication that this procedure was followed after 1720.*

Blackstone, whose *Commentaries* probably did much to influence the thinking of American lawyers at and before the time of the framing of the Federal Constitution, pointed out that:

> "A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal" (Vol. IV, p. 286).

That contempts, insofar as punishment is concerned, were sui generis and were not "infamous crimes" within the meaning of the Fifth Amendment has been recognized over the past century and a half. As early as 1812, the Supreme Court of the United States pointed out that "the United States Courts had no Common Law jurisdiction in criminal cases, and that their jurisdiction must, in each case, depend upon a statute, except that the power to fine or imprison for contempt is a power which necessarily resides in the courts of justice from the nature of their institution and does not depend upon statute. *The United States v. Hudson and Goodwin*, VII Cranch 32 (1812). In 1811, the Court for the Trial of Impeachments and the Correction of Errors of the State of New York held:

> "A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same be punishable as a crime or misdemeanor, on indic-

* "*Power of Congress over Procedure in Criminal Contempts*" Frankfurter and Landis, 37 Harv. L. Rev. 1010 at 1042 (1924).

ment, or not." *Yates v. Lansing*, 9 Johns. 395, 413 (1811).

Cooley in *Constitutional Limitations* (8th Ed. 1927), p. 668, Note 2, states:

> "The power to punish contempts summarily is incident to courts of record, and the courts have generally held that cases of contempt are not triable by jury. The objects of the power would be defeated in many cases if they were."

The power to punish for contempt is not controlled by the Constitution as to modes of accusation and methods of trial. *In re Michaels*, 146 F. 2d 627 (C. A. 3, 1944), rev'd on other grounds, 326 U. S. 224 (1945). A Court in enforcing obedience to its orders by proceedings for contempt "is not executing the criminal laws of the land" nor in such a proceeding is there "any invasion of the constitutional right of trial by jury." *In re Debs*, 158 U. S. 564, 594, 596 (1895); see *United States v. United Mine Workers*, 330 U. S. 258 at p. 298 (1947).

Whether the right of trial by jury for criminal contempt should be granted by appropriate amendment to the statute or rule is a matter which appropriately may be argued. "*Contempt of Court, Criminal and Civil*", Joseph H. Beale, Jr., 21 Harv. L. Rev. 161 (1908); "*Civil and Criminal Contempt in the Federal Courts*," 57 Yale L. Journal 83 (1947).

However, no such argument was made by the respondent. He limited his argument solely to the extent of the sentence. Such sentence, it has been established, rests solely in the sound discretion of the Court, subject only to the Constitutional provision against cruel and unusual punishment. *United States v. Ledcor*, 140 F. 2d 136 (C. A. 7, 1944). Thus, in *Hill v. United States ex rel. Weiner*, 300 U. S. 105 (1937) a two-year sentence was affirmed; in *Cun-*

ley v. *United States*, 59 F. 2d 929 (C. A. 8, 1932), a two-year sentence was affirmed; in *United States* v. *Ball*, 198 F. 2d 726 (C. A. 2, 1952), cert. den. 345 U. S. 905, a three-year sentence was affirmed; in *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2, 1954), a four-year sentence was affirmed.

In the exercise of the discretion residing in the Court, the respondent has been sentenced to three years in the penitentiary following the completion of the five year sentence which was originally imposed upon him.

Dated: New York, N. Y., April 16, 1956.

s/ ARCHIE O. DAWSON,
U. S. D. J.

APPENDIX B

Statutes Involved

18 U. S. C. 401, 62 Stat. 701, provides in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • •
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402, 63 Stat. 90, provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months.

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This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed by disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 7 (a) of the Federal Rules of Criminal Procedure provides:

Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

APPENDIX C

Digest of State Statutes Specifying Punishment for Criminal Contempt

State	*Maximum Penalty*	*Reference*
Ala.	$100 and 10 days	13 Code 9.
Ariz.	If the act is also a criminal offense, $1,000 and 6 months; otherwise, "in conformity to practice and usage of the common law."	27 Code 601, 04
Ark.	$50 and 10 days	34 Stats. 902
Calif.	$500 and 5 days	Code Civ. Proc. 1218
Colo.	No provision	
Conn.	$100 and 6 months	Gen'l Stats., 7702, 8820
Del.	No provision	
Fla.	No provision	
Ga.	$500 and 20 days	24 Code 2613, 2801
Ida.	$500 and 5 days	Code, 7 610
Ill.	No provision	
Ind.	$500 and 3 months	5 Stat. 900
Ia.	$1,000 and 6 months	665 Code 4
Kan.	No provision	
Ky.	$20 and 30 hours where no jury	132 R. S. 260
La.	$100 and 10 days	15 R. S. 12
Me.	No provision	
Md.	No provision	
Mass.	Misdemeanor; commitment to common jail only.	274 Laws 1; 220 Laws 14

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State	*Maximum Penalty*	*Reference*
Mich.	$250 and 30 days	4 Comp. Laws 29
Minn.	$250 and 6 months	1888 Stats. 107
Miss.	$100 and 30 days	2 Code 1050
Mo.	Misdemeanor; $1,000 and 1 year.	R. S. 1919 120, 5360 040, 5360 060
Mont.	Misdemeanor; $500 and 6 months	94 Code 110, 3540
Neb.	No provision	
Nev.	$500 and 25 days	Laws, 8660
N. H.	No provision	
N. J.	No provision	
N. M.	"Usage of the courts of the United States."	39 Stats. 1 2
N. Y.	Misdemeanor; $250 and 30 days	Penal Law, 600; Judiciary Law, 751
N. C.	$250 and 30 days	5 Gen. Stats. 4
N. D.	$250 and 30 days	27 Code 1002
Ohio	$500 and 10 days	Code, 12142
Okla.	Fine and imprisonment at discretion of the court	21 Stats. 566
Ore.	$300 and 6 months	R. S. 33.020
Pa.	Fine only when contempt not committed in open court	17 Stats. 2042
R. I.	Fine or imprisonment or both	Chap. 500 Gen'l Laws, Sec. 30 s 1928 1
S. C.	Imprisonment in penitentiary prohibited	Constit., Art. I, Sec. 19
S. D.	Misdemeanor; $500 and 1 year.	Code, 13.0607, 13.1205
Tenn.	$50 and 10 days	Code, 10120

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State	*Maximum Penalty*	*Reference*
Tex.	$100 and 3 days	Stats., 1911
Utah	$200 and 30 days	4 Code 32 10
Vt.	Misdemeanor	Stats. 1274, 8615, 9960
Va.	No provision	
Wash.	$500 and 6 months	R. Code, 7 20 020
W. Va.	No provision	
Wisc.	Fine and 6 months	226 Stats. 125
Wyo.	No provision	